SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 987

JOHN F. NUTT and EILEEN M. NUTT, *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATUTES:

Internal Revenue Code of 1954:

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Petitioners pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the Tax Court is reported at 39 T.C. 231. The opinion of the court of appeals is reported at — F. 2d — and is reprinted in Appendix A, *infra.*

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1965 (Appendix A, *infra*, p. 5a). On November 9, 1965, the court of appeals denied the petition for rehearing which had been filed by petitioners on October 30, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

QUESTION PRESENTED

Whether a leasehold held for a term of more than six months and used in the taxpayer's trade or business constitutes "property used in the trade or business" within the meaning of that phrase as used in Section 1231(b)(1) of the Internal Revenue Code of 1954.

STATUTE INVOLVED

The statute involved, Section 1231(b) of the Internal Revenue Code of 1954, is set forth in Appendix B, *infra*, p. 6a.

STATEMENT

During 1955 petitioner John F. Nutt, a farmer, was the lessee of several parcels of farm acreage. The landlords were Dorothy Zook, Fidel Salazar, Henry Wagner, and Frances Nutt, the petitioners' adult daughter. Petitioner farmed the land covered by each lease. Each lease was for a term in excess of six months and each lease had been held for more than six months. On August 30, 1955, petitioner sold to Black Land Farms, Inc., an Arizona corporation, for the sum of $94,656.87 the leaseholds on the Zook, Salazar, Wagner and Frances Nutt farms. The gain on the sale of the leaseholds was and is claimed as gain realized from the sale of "property used in the trade or business" of

petitioner as that phrase is used in Section 1231(b)(1) of the 1954 Internal Revenue Code. However, both the Tax Court and the court of appeals denied petitioners the benefit of Section 1231(b)(1). The rationale of both decisions was that since a leasehold is not land, it does not qualify as "property used in the trade or business" as such phrase is specifically defined in Section 1231(b)(4) of the 1954 Internal Revenue Code.

REASONS FOR GRANTING THE WRIT

The leasehold here constituted "property used in the trade or business" within the meaning of that phrase as found in Section 1231(b)(1) of the 1954 Internal Revenue Code. The reason is that such leaseholds were property used in the trade or business of petitioner of a character subject to the allowance for depreciation provided in Section 167 of the 1954 Internal Revenue Code and held for more than six months. *Robert Treat Hotel Co.*, 20 BTA 968 (1930); T.D. 3760, IV-2 CB 154; *Hotel de France Co.*, 1 BTA 28 (1924); *Newmarket Co.*, 2 BTA 537 (1925); *The Hub, Inc.*, 3 BTA 1259 (1926); *Newman*, 10 BTA 158 (1928); *Crandall Horse Co.*, 8 BTA 1132 (1927); *Opperman Coal Co.*, 6 BTA 1215 (1927).

Petitioners claim the benefits of Section 1231(b)(1). They did not[1] and do not claim the benefits of Section 1231(b)(4). Therefore, to rule as the court of appeals did, that leaseholds are not land within the meaning of

[1] That petitioners did not claim the application of Section 1231(b)(4) is shown by the fact that they did not add to the cost basis of the leaseholds the cost of raising the crops on the leaseholds as is required by Section 268, and by the briefs filed in the Tax Court and the court of appeals.

the term "land" as found in Section 1231(b)(4) on the strength of *Bidart Bros.* v. *United States,* 262 F. 2d 607, is not enough to support a holding that the subject leaseholds are not "property used in the trade or business" as defined in Section 1231(b)(1). Yet that is the effect of what the court of appeals did.

The decision of the court of appeals conflicts with the decisions of other circuits which recognize that a leasehold constitutes "property used in the trade or business" and that any profit realized from the sale thereof is entitled to capital gain treatment. *Commissioner of Internal Revenue* v. *McCue Bros. & Drummond, Inc.,* 210 F. 2d 752 (2d Cir., 1954); *Commissioner of Internal Revenue* v. *Louis W. Ray et ux.,* 210 F. 2d 390 (5th Cir., 1954); *Commissioner of Internal Revenue* v. *Golonsky,* 200 F. 2d 72 (3rd Cir., 1952).

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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